ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-5915

BRENDA F. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER, individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent City of Roanoke Redevelopment and Housing Authority, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 771 F.2d 833.

QUESTION PRESENTED

Do public housing tenants have a federal cause of action under 42 U.S.C. § 1983 to redress individual grievances arising out of their local landlord's implementation of technical utility regulations promulgated by the Department of Housing and Urban Development?

STATEMENT OF THE CASE

Petitioners are tenants of public low-cost housing projects located in the City of Roanoke, Virginia. Respondent, the City of Roanoke Redevelopment and Housing Authority ("RRHA"), is a local public housing authority ("PHA") which manages lower income housing projects pursuant to an Annual Contributions Contract ("ACC") with the Department of Housing and Urban Development

("HUD"). This contract is required by the Public Housing Act of 1937, 42 U.S.C. §§ 1437-1437j (1985) ("the Act") and requires the PHA to abide by the Act and the regulations issued thereunder.[1] Among the many regulations promulgated by HUD, public housing authorities are directed to provide certain utilities, including electricity, in accordance with an allowance scheme. 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985).

The Housing Act announces the policy of Congress to assist the States in remedying unsafe and unsanitary housing conditions and to alleviate the acute shortage of decent, safe, and sanitary dwellings for low-income families. The Act also establishes the maximum "a family shall pay as rent" for dwelling units subsidized under the statute. 42 U.S.C. § 1437a (1985). Nowhere in the Housing Act does Congress provide tenants with free electricity or other utilities.

On December 8, 1982, Petitioners filed suit for injunctive relief and damages in the United States District Court for the Western District of Virginia against RRHA, contending that Petitioners' PHA-allowed electricity (and surcharges for excess usage) were not being provided in accordance with the Act and HUD regulations. Petitioners' action was based solely on 42 U.S.C. § 1983, seeking redress for deprivation of "rights, privileges or immunities secured by the Constitution and laws" alleged to arise from the failure of RRHA to properly or fully implement HUD regulations governing the establishment of electrical utility allowances.

On December 21, 1984, the district court, treating RRHA's motion for judgment on the pleadings as a motion for summary judgment, dismissed the Petitioners' case, concluding that

[1]The ACC between RRHA and HUD was made part of the record in this case by affidavit in the district court and was considered by the courts below in reaching their decisions. Pertinent portions of the ACC are set out in the Appendix hereto. (Respondent's Appendix, A. 5-6).

Petitioners have no right of action under 42 U.S.C. § 1983.[2] Petitioners appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, challenging the district court's holding that Petitioners have no § 1983 remedy.[3] Petitioners' claim for injunctive relief was mooted by HUD's adoption of new utility regulations, effective October 2, 1984, and RRHA's revision of its utility allowances pursuant to the new utility regulations. Accordingly, Petitioners' sole claim in the circuit court was one for damages. The circuit court, applying the tests set out in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), and Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), concluded that no § 1983 action was available to Petitioners and that HUD alone is the party which must take legal action to enforce the provisions of the Act and its implementing regulations against the local PHA.[4] (Petitioners' Appendix, A. 6-7).

The lower courts have not addressed the underlying facts or the merits of Petitioners' substantive claim. RRHA's compliance or noncompliance with the regulations, the amount of electricity provided, and the propriety of any surcharges are not at issue in this appeal. The sole issue in this case is whether the Fourth Circuit erred in concluding that tenants of low-cost public housing have no right of action under § 1983 against a local

[2]The district court also found that Petitioners have no implied right of action under the Housing Act. Petitioners do not contend that such implied right of action exists and thus do not challenge this aspect of the district court's decision. (Petition, p. 5).

[3]Petitioners also asserted a right of action grounded in RRHA's alleged violation of the standard lease agreement between tenants and the Authority, which the circuit and district courts properly dismissed as a pendent claim pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Such lease creates a landlord-tenant relationship governed by state law. The mere fact that the lease is subject to federal regulation does not, in itself, give rise to federal question jurisdiction of its performance or enforcement. See Lindy v. Lynn, 501 F.2d 1367 (3rd Cir. 1974); Ames-Ennis, Inc. v. Midlothian Ltd. Partnership, 469 F. Supp. 939, 944 (D.Md. 1979); Molton, Allen & Williams, Inc. v. Harris, 436 F. Supp. 853, 857 (D.D.C. 1977).

[4]Indeed, despite RRHA's assertion that HUD is an indispensable party in this suit (Petitioners' Appendix, A. 16) and Petitioners' allegation that HUD has "spurned" its administrative obligations in failing to enforce its contract with the RRHA (Petition, pp. 8-9), Petitioners have consistently refused to join HUD as a party to this suit.

housing authority to recover damages arising out of the housing authority's alleged violation of HUD regulations promulgated pursuant to the Housing Act.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT APPLIED THE PROPER TESTS BELOW; THERE IS NO NEED FOR THIS COURT TO RESTATE THE WELL-ESTABLISHED DISTINCTIONS BETWEEN THE CORT v. ASH TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION AND THE PENNHURST AND MIDDLESEX TESTS FOR A RIGHT OF ACTION UNDER 42 U.S.C. § 1983.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court determined that the phrase "and laws" contained in § 1983 should be interpreted literally to include violations of federal law committed by state officials. As soon became apparent, however, an overly broad interpretation of Thiboutot would prove particularly burdensome to state officials attempting to comply with the myriad of federal directives and would undermine agency authority to promulgate regulations and enforce policy objectives. Accordingly, this Court swiftly noted exceptions to Thiboutot in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex City Sewage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). These decisions make clear, as the Fourth Circuit noted below, that claimants cannot bring suit in federal court any time there is an alleged violation of federal law by state actors. A § 1983 remedy is available only if it can be shown that the statute allegedly violated creates "rights" sufficient to trigger a § 1983 right of action, Pennhurst, 451 U.S. at 28, and that Congress did not preclude a § 1983 remedy by expressly or impliedly foreclosing private enforcement of that statute in the enactment itself. Middlesex, 453 U.S. at 20. As the Fourth Circuit's opinion correctly reflects, the Pennhurst and Middlesex tests are independent of the analysis that this Court adopted in Cort v. Ash, 422 U.S. 66 (1975), to determine whether a private right of action may be implied from a statute.

The Fourth Circuit properly applied the Pennhurst and Middlesex tests in the proceedings below; Petitioners' assertion

that the Fourth Circuit's decision heavily relied on the Cort v. Ash implied right of action analysis is unfounded. (Petition, pp. 9-11). The Fourth Circuit's discussion of Cort v. Ash, set out in a closing footnote, simply examined how the Cort analysis might have been applied in this case. (Petitioners' Appendix, A. 8-9, n.9). The circuit court's brief exposition of this alternative analysis was wholly advisory. Rendered in an effort to make the court's decision complete, the Fourth Circuit's review of the question is analogous to this Court's discussion sua sponte in Middlesex of the petitioner's alternative right of action under § 1983. 453 U.S. at 19. Indeed, Judge Gordon's concurrence in the Fourth Circuit reiterates that the § 1983 and Cort v. Ash tests, though similar, are discreet and reassures that the Fourth Circuit decision in the instant case is based on the "correct inquiry." (Petitioners' Appendix, A. 14).

The Fourth Circuit's decision below was properly based on Middlesex and Pennhurst, and there is no need for this Court to grant a writ of certiorari to restate the well-established distinction between the Cort v. Ash test for an implied private right of action and the Pennhurst and Middlesex tests for a right of action under 42 U.S.C. § 1983.

II. HUD'S IMPLEMENTING REGULATIONS DO NOT VEST IN PUBLIC HOUSING TENANTS RIGHTS SUFFICIENT TO ENFORCE UTILITY ALLOWANCE GRIEVANCES IN FEDERAL COURT UNDER § 1983.

A review of the policy underlying the Housing Act of 1937, reveals that HUD regulations promulgated from time to time pursuant to the Act do not vest in public housing tenants "rights" sufficient to enforce utility allowance grievances in federal court under § 1983.

The Act expressly declares:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income . . . .

42 U.S.C. § 1437 (1981) (emphasis added). This broad declaration

of policy establishes the Act's primary purpose of providing direct financial incentives to the States and their local agencies in order to increase and improve the housing stock available to lower income tenants. This purpose was properly recognized by the Fourth Circuit. The court found the indirect benefits conferred on lower income tenants by the Act's voluntary federal-state funding scheme insufficient to vest tenants with substantive, enforceable rights. (Petitioners' Appendix, A. 5) Indeed, Pennhurst makes clear that even where a statute may expressly state that individuals benefited by legislation have certain "rights" under the statute, if such rights are nonspecific or hortatory they cannot be enforced under § 1983. Certainly, the hortatory policy language of § 1437 provides Petitioners no specific rights to housing or free electricity. See Perry v. Housing Authority of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981).

In order to establish their "right" to free electricity, Petitioners rely on the language of 42 U.S.C. § 1437a, which instructs HUD as to the income levels that public housing tenants must meet to be eligible for public housing and which directs HUD as to the amount of rent that these tenants may be charged for their housing. The Housing Act, however, does not present the rent level nor the eligibility criteria as "rights" of housing tenants, but rather as directives to HUD. Furthermore, the Housing Act does not provide for, nor even mention, the availability of utility allowances to public housing tenants. Such allowances are purely creations of HUD.[5] 24 C.F.R. §§ 865.470-.482 (1980), superceded by 24 C.F.R. §§ 965.470-.480 (1985).

There is no express or implied right to specific utility allowances in the Housing Act sufficient to entitle tenants to a § 1983 right of action under Pennhurst. Likewise, no such

[5]Indeed, the fact that HUD could, without congressional approval, rescind the regulations relied on by Petitioners is evidence that Congress did not intend to provide tenants a "right" to utility allowances enforceable under § 1983.

"right" may be implied from the language or framework of HUD regulations. Congress has granted HUD wide latitude in the implementation and enforcement of housing regulations. Nowhere is HUD's exercise of discretion more apparent than in the field of utility allowances. HUD maintains the discretion not only to set utility allowance guidelines, but also the discretion under its regulations and its Annual Contributions Contracts ("ACCs") to audit, evaluate and determine whether PHA utility allowance rates are in compliance with HUD directives. See 24 C.F.R. § 965.473(d)(1985); ACC §§ 311 (audits) 507-08 (governmental remedies in event of breach). This broad agency discretion is particularly vital under a complex federal-state funding scheme. It provides HUD with the flexibility to implement an ongoing review process and permits the agency to engage in continuing dialogue with the States and tenants, issuing directives to them and listening to their comments and complaints with regard to the feasibility -- or lack thereof -- of Department regulations. HUD's policymaking and enforcement authority would be severely undermined if the regulatory process could be circumvented by tenants bringing suit in federal court under § 1983 to redress their individual grievances concerning the implementation and interpretation of HUD guidelines.[6]

III. CONGRESS DID NOT INTEND ROUTINE PUBLIC HOUSING TENANT-LANDLORD DISPUTES TO BE LODGED IN FEDERAL COURTS WHENEVER SUCH DISPUTES MIGHT FINANCIALLY AFFECT TENANTS.

The Fourth Circuit correctly recognized that it would be impractical for federal courts to review and calculate the complex and highly technical regulatory allowance scheme created

[6]Because utility allowance regulations are highly controversial and historically have engendered a significant amount of comment from PHAs and tenant groups, see 49 Fed. Reg. 31401 (Aug. 7, 1984), a continuing process of comment and revision is necessary to effectively respond to the various parties' interests. Indeed, the interim rules upon which this suit is based were rejected by HUD as a result of this fine-tuning process of ongoing comment and review, which resulted in regulations that Petitioners concede are "different in their procedural and substantive requirements" from the initial interim guidelines. (Petition, p. 5). If tenants are to be vested with rights under interim regulations cognizable under § 1983, there is a danger that courts may enforce literally that which HUD intends to be part of the give and take of the rulemaking process.

by HUD: "[W]e consider it highly unlikely that Congress intended federal courts to make the necessary computations regarding utility allowances that would be required to adjudicate individual claims of right."[7] (Petitioners' Appendix, A. 7). Implicit in the court's finding is a recognition of the strain that would be placed on our federal courts if public housing tenants are deemed possessed of rights cognizable under § 1983 whenever a tenant-landlord dispute may have an economic impact on a public housing tenant. Clearly, if tenants of public housing are afforded a right to free electricity enforceable under § 1983, federal courts will be deluged with highly individualized landlord-tenant disputes of a nature traditionally and properly left to the jurisdiction of the state courts. In the present setting, for example, a federal court would have to analyze the consumption habits and utility allotments of over 1100 tenants.

The Fourth Circuit correctly noted that the framework of the Housing Act and HUD regulations establishes that the enforcement of the utility allowances is better left to HUD than to the federal courts. (Petitioners' Appendix, A. 6). Congress has charged HUD with the responsibility of monitoring the PHAs' implementation of HUD regulations contained in Annual Contributions Contracts:[8]

> Under the [Housing Act] the Secretary performs extensive audits to verify the authorities' compliance with the conditions of the ACC, and HUD is authorized, as contract promisee, to enforce compliance by the most drastic possible means: termination of the federal subsidies under the contract.

(Petitioners' Appendix, A. 6) (quoting Phelps v. Housing Authority of Woodruff, 742 F.2d 816, 821 (4th Cir. 1984). In addition to HUD's power to force compliance with its directives under the ACC, Congress has specifically mandated that each public housing agency receiving federal assistance under the Housing Act establish and implement a grievance procedure for tenant disputes. 42 U.S.C. § 1437d(k) (1985). Thus, potentially costly and divisive tenant-management disputes can be resolved administratively, enabling the PHA to manage the day-to-day operation of the housing project with a minimum of outside interference.

In reviewing the framework of the Housing Act, placing special emphasis on HUD's power under the ACC, the Fourth Circuit concluded that Congress intended to foreclose private enforcement of the Act by public housing tenants under § 1983. (Petitioners' Appendix, A. 6). Any other finding would flood federal courts with landlord-tenant disputes involving highly technical computations and would disrupt agency authority in a field where Congress has granted HUD broad discretion.

IV. THE DECISIONS OF CIRCUIT COURTS CITED BY PETITIONERS TO ESTABLISH A CONFLICT ARE DISTINGUISHABLE FROM THE CASE DECIDED BY THE FOURTH CIRCUIT ON BOTH MATTERS OF LAW AND FACT.

The Fourth Circuit in this case determined that tenants of low-cost housing have no "right" to free electricity enforceable under § 1983. In challenging the Fourth Circuit's resolution of this question, Petitioners rely on several circuit court decisions in an effort to establish a conflict among the circuits. In fact, there is no significant, substantive conflict warranting this Court's discretionary review. The cases cited by Petitioners as evidence of a conflict are distinguishable from

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[7] Under the now superceded regulations upon which this suit is based, 24 C.F.R. § 865.476 (1980), utility allowance calculations involved an analysis of prior consumption tables and rates in similarly-constructed projects. In addition, the regulations permitted a PHA to make substantial surcharges before it was required to recalculate or review its utility allowance schedule. 24 C.F.R. § 865.480(b) (1980). HUD's new revised guidelines set out a similarly complex calculation scheme. See 24 C.F.R. § 965.476 (1985). The complexity of the regulations, and their highly flexible nature, establish that they were not intended to be specific mandates enforceable under § 1983.

[8] RRHA, like all housing authorities participating in federal low-cost housing programs, operates its low-income projects with federal subsidies pursuant to an Annual Contributions Contract. The ACC provides that if RRHA breaches any of its obligations under the Contract, HUD has the "right . . . to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or to enjoin any such default or breach." HUD Annual Contributions Contract § 508.

the instant case on matters of law as well as fact.[9]

Petitioners erroneously rely on Beckham v. New York City Housing Authority, 755 F.2d 1074 (2d Cir. 1985), for the proposition that the Housing Act creates in tenants of low-cost housing an enforceable right to specific utility allowances created by HUD regulation. In Beckham, tenants of HUD-subsidized housing challenged the local PHA's policy of increasing the rent of tenants who fail to recertify their income and family composition in a timely manner. The tenants claimed that the PHA's policy violated § 1437a(a)(1) of the Housing Act, which requires that rent charged on assisted units be "30 per centum of the family's adjusted income . . . ." Thus Beckham is a rent case brought under § 1983 to vindicate tenants' claimed statutory "right" to specific rent limits provided in the express terms of the Act. In the case before the Fourth Circuit, however, Petitioners' claimed "right" is not based on a specific statutory "right," but rather is derived from a highly complex regulatory scheme created solely by HUD to govern the calculation of certain tenant utility allowances. This regulatory scheme does not create rights cognizable under the "and laws" language of § 1983.[10]

Petitioners have also cited Samuels v. District of Columbia, 770 F.2d 184 (D.C. Cir. 1985), as evidence of a conflict. In Samuels, tenants of low-cost public housing brought a § 1983 action seeking implementation of the administrative grievance

[9]Indeed, Pietroniro v. Borough of Oceanport, 764 F.2d 976 (3rd Cir. 1985), turns on facts so incongruous to those of the case before the Fourth Circuit that it may be dismissed out of hand. The Pietroniro decision involves a corporation's § 1983 claim for damages and declaratory and injunctive relief under the Housing Act of 1949, 42 U.S.C. § 1455(c)(1) and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4625. Nowhere in that case is the question of public housing tenants' § 1983 right of action for violations of regulatory utility limitations or the Housing Act of 1937 implicated.

[10]Moreover, although the circuit court assumed jurisdiction of the Beckham tenants' rent claim under § 1983, the court determined the action of the PHA did not violate the rent provisions of § 1437a. 755 F.2d at 1079-80. In reaching this conclusion, the Second Circuit relied on the very policies of efficient management of housing programs and effective use of limited housing assistance funds that underlie the Fourth Circuit's opinion in the instant case.

procedure expressly required by the Act, 42 U.S.C. § 1437d(k) (1985). Regulations establishing the grievance mechanism were before the court only as part of the comprehensive remedial scheme mandated by the Act. The court incorporated these regulations, the contents of which are expressly defined by the Act, into its decision that the tenants had a § 1983 remedy for the PHA's violation of § 1437d(k). The circuit court concluded that the "and laws" clause of § 1983 includes "at least those federal regulations adopted pursuant to a clear congressional mandate that have the full force and effect of law." 770 F.2d at 199.

Even if it is assumed only for the purpose of argument that the D.C. Circuit's reading of § 1983 is correct, Petitioners' alleged "right" to free electricity is founded on a regulatory scheme very different from the congressionally-mandated, specifically-defined grievance regulations in Samuels. Unlike the implementing regulations adopted pursuant to § 1437d(k), the utility allowance regulations relied on by Petitioners were not promulgated in response to a statutory directive. Nowhere in the Housing Act does Congress require that electricity be provided to tenants of public housing.[11]

Petitioners rely on the Sixth Circuit's decision in Howard v. Pierce, 738 F.2d 722 (6th Cir. 1984), to establish, by analogy, a § 1983 right of action vested in public housing tenants under the Housing Act. Howard, however, holds only that tenants may have an implied right of action against HUD (not a local PHA) under 42 U.S.C. § 1437a. 738 F.2d at 730-31. The court's decision thus supports the Fourth Circuit's conclusion that HUD, and not RRHA, is the party to which Petitioners must turn to obtain federal enforcement of the Housing Act and its

[11]Moreover, Samuels involves a systematic deprivation of a comprehensive enforcement scheme provided by the Act. The housing authority's refusal to implement the grievance procedure established by § 1437d(k) foreclosed a fundamental avenue of relief available to tenants. In such circumstance, a § 1983 right of action may necessarily lie to enforce the statute's remedial scheme. In the instant case, the Annual Contributions Contract and the grievance procedure established in § 1437d(k) are available to Petitioners as proper, effective remedies for their grievance in this case.

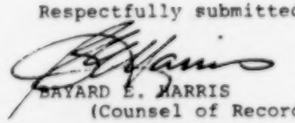
regulations. Moreover, Petitioners have gone to great lengths to establish that the Cort v. Ash, 422 U.S. 66 (1975), implied right of action inquiry is independent of the § 1983 question. Petitioners, however, cite Howard to argue that evidence of an implied right of action is evidence of a § 1983 right of action. Paradoxically, Petitioners also expressly disclaim any reliance on a purported implied private right of action. The Fourth Circuit properly recognized the tests as distinct, as has been established by decisions of this Court. See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. at 19.

Petitioners also cite as evidence of a potential conflict cases pending in the Eleventh Circuit, Brown v. Housing Authority of McRea, No. 85-8186 (11th Cir.), and Nelson v. Greater Gadsden Housing Authority, 85-7320 (11th Cir.), in which the a... ability of a § 1983 private right of action to tenants under the HUD utility regulations is to be determined. With no decision as of yet rendered in either case, Petitioners' claim that these actions may be a basis of a conflict is purely speculative and thus untimely. This Court should not prematurely supplant the role of the federal circuit courts in reviewing these issues.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1437. Declaration of policy

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this Act, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and, consistent with the objectives of this Act [42 USCS §§1437-1437j], to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs. No person should be barred from serving on the board of directors or similar governing body of a local public housing agency because of his tenancy in a lower income housing project.

42 U.S.C. § 1437a. Rental payments; definitions

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o)[42 USCS § 1437f(o)]) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

* * *

42 U.S.C. § 1437d(k).

(k) The Secretary shall by regulation require each public housing agency receiving assistance under this Act to establish and implement an administrative grievance procedure under which tenants will--

(1) be advised of the specific grounds of any proposed adverse public housing agency action;

(2) have an opportunity for a hearing before an impartial party upon timely request within any period applicable under subsection (1);

(3) have an opportunity to examine any documents or records or regulations related to the proposed action;

(4) be entitled to be represented by another person of his choice at any hearing;

(5) be entitled to ask questions of witnesses and have others make statements on his behalf; and

(6) be entitled to receive a written decision by the public housing agency on the proposed action.

An agency may exclude from its procedure any grievance concerning an eviction or termination of tenancy in any jurisdiction which requires that, prior to eviction, a tenant be given a hearing in court which the Secretary determines provides the basic elements of due process.

24 C.F.R. § 865.476 (1980). Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities) (superceded by 24 C.F.R. §965.476 (effective October 2, 1984)).

(a) Where records are available for the particular housing. The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current three-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the PHA shall use records for the most current two-year period, or if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records of the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) Where records are not available for the particular housing. For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) Source data for Tenant-Purchased Utilities. In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize a method which it finds best taking into consideration practicability, reliability, and administra-

tive cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.480 (1980). Review and revision of allowances (superceded by 24 C.F.R. § 965.478 (effective October 2, 1984)).

(a) Revisions by Reason of Inadequate Data Base (for PHA-Furnished Utilities). Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) Allowance for PHA-Furnished Utilities. (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA shall determine the number and percentage of tenants who are subject to surcharge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

* * *

Annual Contributions Contract.

Sec. 5. Covenant to Develop and Operate

(1) The Local Authority shall develop each Project being or to be developed and shall operate all Projects covered by this Contract in compliance with all provisions of Contract and all applicable provisions of the Act and applicable provisions of state and local law.

Sec. 311. Access to Records and Projects; Audits

(A) The Government and the Comptroller General of the United States, or his duly authorized representatives, shall have full and free access to the Projects and to all the books, documents, papers, and records of the Local Authority that are pertinent to its operations with respect to financial assistance under the Act, including the right to audit, and to make excerpts and transcripts from such books and records.

* * *

Sec. 507. Definition of Substantial Breach

* * *

(8) If there is any default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract other than the defaults or breaches enumerated in Sec. 506 or in subsections (1) through (7) of this Sec. 507; and if such default or breach has not been remedied within thirty days (or such longer period as may be set by the Government) after the Government has notified the Local Authority thereof.

Sec. 508. Other Defaults or Breaches, and Other Remedies

* * *

(B) If the Local Authority shall at any time be in default or breach, or take any action which will result in a default or

breach, in the performance or observance of any of the terms, covenants, and conditions of this Contract, then the Government shall have, to the fullest extent permitted by law (and the Local Authority hereby confers upon the Government the right to all remedies both at law and in equity which it is by law authorized to so confer) the right (in addition to any rights or remedies in this Contract specifically provided) to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or breach or to enjoin any such default or breach.